TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 294

ONE 1958 PLYMOUTH SEDAN, PETITIONER,

vs.

PENNSYLVANIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

PETITION FOR CERTIORARI FILED JULY 17, 1964
CERTIORARI GRANTED DECEMBER 7, 1964

SUPREME COURT OF THE UNITED STATES

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INDEX

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[fol. 4]

IN THE COURT OF QUARTER SESSIONS OF PHILADELPHIA COUNTY, PENNSYLVANIA

Miscellaneous Liquor

Condemnation Docket

February Term, 1961—No. 4

COMMONWEALTH OF PENNSYLVANIA,

—VS.—

ONE 1958 PLYMOUTH (PLAZA) SEDAN
Manufacturer's Serial No. LP1N3159,

In possession of:
GEORGE MCGONIGLE,

GEORGE MCGONIGLE
Reputed Owner.

PETITION FOR FORFEITURE—Filed January 23, 1961

To the Honorable, the Judges of the Said Court:

The Petition of the Pennsylvania Liquor Control Board by its Counsel, Russell C. Wismer, Esquire, Special Assistant Attorney General, respectfully represents:

1. That on December 16, 1960 on the highway on Vine Street, west of 6th Street in the City and County of Philadelphia, Commonwealth of Pennsylvania, there was seized by Enforcement Officers of the Pennsylvania Liquor Control Board the following described property, to wit: One 1958 Plymouth (Plaza) Sedan, Manufacturer's Serial No. LP1N3159.

2. That said property is owned by or is reputed to be owned by George McGonigle, residing at 9200 Atlantic Avenue, Margate City, New Jersey, and was at the time of said seizure in the possession of George McGonigle.

[fol. 5] 3. That at the time of said seizure, the above described property had been possessed or used, or was in

tended for use in violations of the terms and provisions of the Pennsylvania Liquor Code of April 12, 1951, P.L. 90.

Wherefore, your petitioner prays that your Honorable Court make an order of forfeiture adjudging the said property forfeited to the Commonwealth of Pennsylvania unless cause be shown to the contrary.

Pennsylvania Liquor Control Board, By its Counsel: Russell C. Wismer, Special Assistant Attorney General.

[fol. 6] *Duly sworn to by Herman Reitman, jurat omitted in printing.*

[fol. 7]

IN THE COURT OF QUARTER SESSIONS OF PHILADELPHIA COUNTY, PENNSYLVANIA

Miscellaneous Liquor

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February Term, 1961—No. 4

COMMONWEALTH OF PENNSYLVANIA,

—VS.—

ONE 1958 PLYMOUTH (PLAZA) SEDAN
Manufacturer's Serial No. LP1N3159,

In possession of:

GEORGE MCGONIGLE,

GEORGE MCGONIGLE
Reputed Owner.

ORDER DISMISSING PETITION FOR FORFEITURE—
October 23, 1961

And Now, to wit, this 23rd day of October, 1961, after hearing upon the Petition for Forfeiture in the above entitled proceeding,

It Is Ordered, Adjudged and Decreed that the Petition for Forfeiture of the 1958 Plymouth (Plaza) Sedan, Manufacturer's Serial No. LP1N3159 is dismissed, and it is directed that the said 1958 Plymouth Sedan be returned to the owner, George McGonigle, who is hereby ordered and directed to pay storage charges attended upon the seizure of said automobile.

By the Court, McClanaghan, J.

[fol. 8]

IN THE COURT OF QUARTER SESSIONS OF
PHILADELPHIA COUNTY
Miscellaneous Liquor
Condemnation Docket
February Term, 1961—No. 4

COMMONWEALTH OF PENNSYLVANIA,

—vs—

ONE 1958 PLYMOUTH (PLAZA) SEDAN
Mfr's Serial No. LP1N3159.

Before: McClanaghan, J.

Present: Russell C. Wismer, Esq., for Commonwealth.
Louis Lipschitz, Esq., for Defendant.

Transcript of Proceedings—July 18, 1961

Philadelphia, Pa.

[fol. 9]

STATEMENT OF COUNSEL

Mr. Wismer: If your Honor please, this is a petition by the Pennsylvania Liquor Control Board first for the forfeiture of a 1958 Plymouth sedan. This car was seized by enforcement officers of the Pennsylvania Liquor Control Board containing three hundred seventy-five bottles, or

slightly over thirty cases of whiskey and wine not bearing Pennsylvania seals. At the time this matter first came before your Honor, which was on the 2nd day of March, 1961, on your liquor list at that time, it was continued at the request of counsel for the reputed owner of the car to a day to be fixed by the Court, and we have now fixed today.

At the time of the hearing on March the 2nd I submitted an affidavit of service of the petition for forfeiture but some how or other it was not kept in the Court record. May I submit that at this time?

The Court: Very well.

Mr. Wismer: An appearance has been entered for McGonigle, the reputed owner, by Mr. Lipschitz.

I am ready to proceed with my testimony.

The Court: Very well.

[fol. 10]

COMMONWEALTH'S EVIDENCE

HERMAN REITMAN, 1009 Foster Road, Philadelphia, Pa., Sworn.

Direct examination.

By Mr. Wismer:

Q. Now, Mr. Reitman, you are an enforcement officer of the Liquor Control Board?

A. Yes, sir,

Q. Did you make the seizure of a 1958 Plymouth sedan registered in the name of one George McGonigle?

A. Yes, sir, I did.

Q. Will you give us, please, the date and time of the seizure?

A. On Friday, December the 16th, 1960 accompanied by Officer Snyder, we stopped and searched this car in question and found it to be loaded with 375 bottles of liquor and wines not bearing the seal of the Commonwealth of Pennsylvania.

Q. What time was that?

A. That was at 6:45 a.m. The car was operated by George McGonigle, who was also the listed owner of the vehicle.

Q. Where did you stop this car?

A. We stopped him on the highway of Vine Street, a bit west of Sixth in Philadelphia. We had followed the vehicle [fol. 11] over the bridge from the Admiral Wilson Boulevard in Camden.

Q. What was the registration number of that car?

A. Pennsylvania registration number 98874B.

Q. When did you first observe this car on the other side of the bridge?

A. Approximately fifteen minutes prior to 6:45 a.m.

Q. Now, when you stopped the car, where was the liquor?

A. We found these bottles of liquor in the rear of the car and in the trunk. The back-rest of the rear seat had been removed and the liquor packed in. We questioned Mr. McGonigle, and he stated—

Mr. Lipschitz: I object to anything Mr. McGonigle said, your Honor.

Mr. Wismer: Well, if your Honor please, he is the registered owner of the automobile and was in possession of the car. I would say that that is perfectly competent testimony.

The Court: I will overrule the objection.

By Mr. Wismer:

Q. Proceed.

A. Mr. McGonigle stated that he had made arrangements with a man known as Charlie to deliver a load of liquor from Margate to Philadelphia for $30.00. He said that on Thursday, December 15, 1960 at 11:00 p.m. he met this [fol. 12] person, Charlie at a dump in Margate, where the transfer of liquor was made from Charlie's car into his Car. He also stated that he had removed the rear seat and back rest of his car and left it lying in the dump. He left Margate at approximately 4:00 in the morning of Friday, December the 16th, 1960 and proceeded directly to Philadelphia, where we stopped him at the highway of

Sixth and Vine. He further stated that he knew it was illegal to haul the liquor into Philadelphia, but he took the chance for $30.00.

Q. Now, how many bottles of liquor were in the car?

A. 375 bottles.

Q. Was that brand liquor, that is, well-known brands?

A. Well, known brands, yes, sir, high-priced liquor.

Q. Did any of this liquor contain Pennsylvania seals?

A. None. They contained seals of the—they were properly packed as far as the Government was concerned.

Q. The Federal Government?

A. Yes, sir, but not as far as the State was concerned.

Q. And did you submit a sample of any of this liquor to the City Chemist?

A. Yes, sir. There was a fifth bottle of Haig and Haig Five Star Scotch was delivered to the chemist and a receipt received from Dr. Edward J. Burke.

Q. Any other?

[fol. 13] A. And a fifth of Seagram's V.O. along with the Haig and Haig Scotch.

Q. What was the chemist's report?

A. It was found to be colored whiskey containing 43.00% by volume of ethyl alcohol.

Q. Now, was McGonigle arrested?

A. Yes, sir. He was placed under arrest, and the liquor and the car were seized.

Mr. Wismer: All right, cross examine.

Cross examination.

By Mr. Lipschitz:

Q. Did you have a search warrant?

A. No, sir, we did not.

Q. Did you have a body warrant for his arrest?

A. No, sir, we did not.

Q. Had you ever seen McGonigle before?

A. No, sir.

Q. Did you have any reason to believe that McGonigle was violating the law before the time that you stopped him?

A. In Camden, yes, sir, we felt that because—

By the Court:

Q. Not you felt. Did you have any reason?

A. Yes, sir. The car was low in the rear, quite low, and that was the reason we followed it into Philadelphia.

[fol. 14] By Mr. Lipschitz:

Q. You had not seen the car before you observed it on the Wilson Boulevard?

A. No, sir, we did not.

Q. So, all you had was a suspicion; is that correct?

A. That's right.

Q. And prior to the time that you stopped this automobile you did not observe it violate the law?

A. No, sir.

Q. Did you at any time obtain a search warrant for this automobile?

A. No, sir.

Q. So, you had no information of any kind concerning McGonigle or the automobile prior to the time that you stopped him?

A. No, sir.

Mr. Lipschitz: That is all.

By Mr. Wismer:

Q. By the way, who was with you, any other officer?

A. Officer Snyder.

JOHN N. SNYDER, 29 Orchard Lane, Norristown, Pa., Sworn.

Direct examination.

[fol. 15] By Mr. Wismer:

Q. Mr. Snyder, you are an enforcement officer of the Liquor Control Board?

A. I am.

Q. Did you hear the testimony that was given by Officer Reitman?

A. I did.

Q. You were with him at the time of the seizure at all times?

A. I was.

Q. Do you corroborate the testimony that he gave?

A. I do.

Q. If the same questions were asked of you in cross examination as were asked of him, would your answers be the same?

A. They would, yes, with one exception.

Q. And that exception is?

A. That I had reason to believe that a late model black four-door sedan, Plymouth, was delivering liquor illegally into Pennsylvania from a dealer in South Jersey.

Mr. Wismer: All right, cross examine.

Cross examination.

By Mr. Lipschitz:

Q. What kind of a car was it?

A. A four-door black Plymouth, late model.

[fol. 16] Q. Where did you get that information?

A. From observations, previous observations.

Q. When did you observe this—did you ever see this automobile before, this Plymouth car involved here?

A. Not that I know of, no.

Q. Did you ever see the man before?

A. No, sir.

Q. So, you had no reason to believe that this car and this man were doing anything illegally?

A. I had reason to believe that this car was doing something illegally, yes.

Q. Well, had you ever seen that car before?

A. It so happened that I never seen it before. I thought I had.

Q. You had never seen this car before?

A. No, sir.

Q. And all that had been described to you was that a car, a black Plymouth, was involved in some kind of a transaction?

A. A four-door sedan.

Q. Who gave you that information?

A. From my own observations.

Q. When did you observe this automobile before?
A. I have never observed this one before.

Mr. Lipschitz: No other questions.
[fol. 17] Mr. Wismer: All right, thank you.
That is our case, your Honor.
The Court: Very well.

(Witness excused.)

STATEMENT OF COUNSEL

Mr. Lipschitz: If your Honor please, my argument opposing this forfeiture is a legal one. It is based primarily on the case of Henry versus the United States, which was recorded in four Legal Edition, Second, 134, where the United States Court decided that a seizure under similar circumstances and an arrest under similar circumstances is illegal. That view of the law was later confirmed on June 19, 1961 in the case of Map versus Ohio. The facts in that case were slightly different because a home was there entered. In the Henry case an automobile was stopped, men were arrested based on suspicion. In both cases the Supreme Court of the United States set aside a conviction and said that the arrest, the search, and the seizure were illegal.

There is another case, if your Honor pleases, on the subject, and that is the case of Patenotte versus United States, which involved an automobile, and the Court of Appeals [fol. 18] for the Fifth Circuit said that there must be a reasonable belief before a man may be stopped, or his automobile may be stopped, before a man may be searched, or his car or premises be searched, that mere suspicion or belief is generally insufficient justification for such a search.

Now, here the officers testified, if your Honor please, they never seen the man or the car before, and one of them testified that all he relied on was suspicion, and suspicion is not probable cause. A probable cause on which a seizure or an arrest may be made is a reasonable belief that the person is actually committing a crime or violating the law. Our Constitution prohibits unreasonable searches and seizures. A search and seizure may be made if a person is committing a crime, and he may be searched if there is

evidence of the crime being committed before the officer. But here the testimony indicates that there was no evidence that any crime was being committed, and it must be as of the time that the man is stopped and not what is later discovered. Justice Douglas said so in the case of Henry versus the United States, and he indicated the fact that the vehicle contained contraband if it appears after the arrest does not indicate and supply the reasonable cause [fol. 19] that must be in existence prior to the stoppage of the individual and prior to the arrest.

There are certain circumstances under which an automobile may be stopped, and Justice Jackson pointed it out in an earlier case and said particularly in regulating traffic where identification is involved. Under those circumstances, where it is a police regulation that is involved, you may stop an automobile; but, here there is no evidence that this automobile was doing anything in violation of the law at the time of the seizure.

If your Honor please, it may be argued to you by the Commonwealth that this law does not apply, that Pennsylvania does not recognize invalidity of search and seizure. Well, that was the law until the Map case on June 19th, 1961, and the Supreme Court there overruled the law that existed in those states which does not apply to the exclusionary rule, I mean the rule that excludes evidence.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: That is illegally obtained, yes, I know.

Mr. Lipschitz: Yes, sir. Now, for those reasons, if your Honor please, I submit that this application for for- [fol. 20] feiture should be dismissed. Now, then there are cases that are cited in the Patenotte Case. In 266 Fed. 2d at Page 650 appears the following statement: The cases have discussed at least five factors, for example, which may be considered by the officers in establishing probable cause for a search: (1) The reputation of our informants reports concerning the occupants. There is no evidence concerning McGonigle's reputation. (2) A like reputation of the vehicle or owners; (3) The condition of the vehicle. There is some suggestion that this vehicle was loaded, but there is nothing here concerning the reputation of the ve-

hicle or the owner. (4) The information from reputable informers as to the existence and legal purpose of the trip. That is not present. (5) The reputation of the location in which they are found. And that is not present.

All of the requirements which would make this either a proper arrest or a proper search and seizure are absent in this case, and I therefore ask that your Honor dismiss the forfeiture request.

The Court: Submit me a memorandum on the cases.

Mr. Lipschitz: Would your Honor extend me the time [fol. 21] until I have the copy of the notes?

The Court: Yes.

Mr. Wismer: If your Honor please, under Section 209 of the Pennsylvania Liquor Code, enforcement officers of the Pennsylvania Liquor Board are entitled to stop and make an arrest on view if they have reasonable grounds to suppose that the man is committing a violation of the Liquor Code or that the car in which he is driving is violating the law.

Now, I believe it is the 21st Amendment to the Federal or United States Constitution, the Repeal Amendment, which places the sole control in the working of the liquor business within the state wherein the liquor is being distributed, sold, or transported. It is solely within the state's authority. Now, I believe that the statement made in this case, which I haven't read, unfortunately, I have only read an excerpt from them from the newspapers, but I do not believe that the legal principles that were set forth in these cases would be valuable here.

The officer stated in his direct testimony that he noticed the car coming in New Jersey and crossing the bridge and [fol. 22] that the car was low in the back. Now, to an enforcement officer in the discharge of his duties, I think that is enough to have him stop that automobile. And particularly is it true when he found what he did in here. I think your Honor can well realize that thirty cases of liquor sitting in the back of a passenger car will make that appear very low in the back. That is what we have here when the officer stopped the car.

The Court: Supposing there had been thirty cases of canned goods?

Mr. Wismer: I would not know the weight, your Honor, of thirty cases of canned goods, but the weight of liquor in my experience and from observing it in other matters of this kind makes the car sit very low. But it is reasonable grounds, I would say to your Honor, for an enforcement officer in the discharge of his duties to stop that car and ask what the man has in it.

Now, it is true that they had no evidence that they had any other or had seen the car before or the man, but a car is coming over the bridge, it is low in the back, and that is their reasonable grounds.

The Court: Suppose it had not been going over the bridge, [fol. 23] it was just going along Market Street here in Philadelphia?

Mr. Wismer: If it were going along Market Street, I think that if the officer were directed to or in that particular area and saw it he would have a perfect right to stop it, yes, sir.

The Court: All right, submit me a memorandum. I will wait for your memorandum, so just as soon as you get to it I will appreciate it.

Mr. Wismer: The next thing we have, your Honor, is the liquor that was in the car.

The Court: Go ahead.

Mr. Wismer: It does not contain Pennsylvania seals. The testimony I will ask you Honor to put in this record would be the testimony given by the enforcement officers who made the seizure. It is liquor that does not bear the seals, cannot be possessed in the Commonwealth. I will, therefore, ask your Honor to decree that that liquor be forfeited. However, there is a criminal case pending, and we have had in recent months experience where the trial judge hearing the liquor case has demanded that the liquor be produced in Court and, therefore, I would ask your Honor to decree a forfeiture of this liquor but hold [fol. 24] up the distribution of it until after the criminal case, and after the criminal case is over I will notify your Honor that the criminal case is over and then you may direct it to whatever hospitals or institutions that you choose.

Mr. Lipschitz: If your Honor please, in behalf of the Defendant, consistent with this application of the Common-

wealth, it is our defense that this evidence be suppressed, the use of the liquor as evidence in any proceeding against the Defendant be suppressed. We are not asking that the liquor be returned to us, but we do have the right—

The Court: I don't have authority in this proceeding to do that, Mr. Lipschitz. I don't like to interfere with someone else's case.

Mr. Wismer: May I submit to your Honor an order for the forfeiture of the car and also an order for the forfeiture of the liquor?

The Court: Very well.

Mr. Wismer: And that you may hold those with the file.

The Court: Very well.

Mr. Lipschitz: I assume your Honor will withhold your decision until we have submitted the briefs.

[fol. 25] The Court: Yes.

[fol. 26] Stenographer's Certificate to foregoing transcript and Judge's approval thereof (omitted in printing).

[fol. 27] IN THE COURT OF QUARTER SESSIONS OF PHILADEEPHIA COUNTY, PENNSYLVANIA

MISCELLANEOUS LIQUOR CONDEMNATION DOCKET
FEBRUARY TERM, 1961—No. 4

COMMONWEALTH OF PENNSYLVANIA,

vs.

ONE 1958 PLYMOUTH (PLAZA) SEDAN Manufacturer's Serial No. LP1N3159,

In Possession of:

GEORGE MCGONIGLE,

GEORGE MCGONIGLE
Reputed Owner.

OPINION—November 30, 1961

This action arose on petition of the Pennsylvania Liquor Control Board praying the court to make an Order of For-

feiture of one 1958 Plymouth (Plaza) Sedan on the basis that at the time of seizure of said automobile it had been possessed or used, or was intended for use, in violation of the terms and provisions of the Pennsylvania Liquor Code of April 12, 1951 P.L. 90. At the time of seizure, the automobile was in the possession of one George McGonigle, the owner, or reputed owner, thereof. The petition stated that on December 16, 1960 on the highway on Vine Street, West of Sixth Street in the City and County of Philadelphia, Commonwealth of Pennsylvania, said automobile was seized by enforcement officers of the Pennsylvania Liquor Control Board. A hearing on the Petition for Forfeiture of said automobile was held on July 18, 1961, and at the conclusion thereof counsel was extended time for the filing of briefs.

The Commonwealth offered the testimony of two enforcement officers who related the circumstances under which they stopped the automobile, searched it, placed the operator of the motor vehicle under arrest, and seized the automobile and the liquor found therein. The Petition for Forfeiture was resisted on the ground that the arrest and [fol. 28] search were invalid and in violation of the constitutional guarantees against unlawful search and seizure. On October 23, 1961 the court dismissed the Petition for Forfeiture of said automobile, and directed that it be returned to the owner, who was directed to pay the storage charges attended upon the seizure of said automobile. From said Order. The Commonwealth has appealed.

At the hearing before the court, enforcement Officer Herman Reitman testified that "on Friday, December 16, 1960, accompanied by Officer Snyder, we stopped and searched this car in question, and found it to be loaded with 375 bottles of liquor and wines, not bearing the seal of the Commonwealth of Pennsylvania". The time and place was 6:45 A.M. on the highway on Vine Street, West of Sixth Street in Philadelphia. The automobile was operated by George McGonigle, the listed owner of said vehicle. The enforcement officer testified that they had followed the vehicle over the bridge (Benjamin Franklin) from the Admiral Wilson Boulevard in Camden. The officer testified that they did not have a search warrant nor a body

warrant for the arrest of said McGonigle, and that they had never seen McGonigle nor the automobile in question before. He stated that all they had was a suspicion based on "The car was low in the rear, quite low, and that was the reason we followed it into Philadelphia". He admitted "They had no information of any kind concerning McGonigle or the automobile prior to the time that they stopped him".

Officer Snyder corroborated the testimony of Officer Reitman who stated "That he had reason to believe that a late model, black, four-door Sedan, Plymouth, was delivering liquor illegally into Pennsylvania from a dealer in South Jersey". He stated that he obtained this information from [fol. 29] his own previous observations, but then admitted he had never before seen the instant automobile nor the driver McGonigle. No other testimony was submitted by the Commonwealth.

The basis for the respondent's resistance to the Petition is that the action of the enforcement officers in stopping the automobile, searching the automobile, arresting the driver, and seizing the automobile and the liquor, was not based on reasonable and probable cause and, therefore, was in violation of the United States Constitution, which prohibits unreasonable searches and seizures.

Section 209 of the Pennsylvania Liquor Code (1951, April 12, P.L. 90, Article II, Section 209) provides that enforcement officers are declared to be peace officers and are given police power and authority throughout the Commonwealth to arrest on view, except in private homes, without warrant, any person actually engaged in the unlawful sale, importation, manufacture or transportation, or having unlawful possession of liquor, alcohol or malt or brewed beverages, contrary to the provisions of the Liquor Act or any other law of the Commonwealth. The Section then provides as follows:

> "Such officers and investigators shall have power and authority, upon reasonable and probable cause, to search for and to seize without warrant or process, except in private homes, any liquor, alcohol and malt or brewed beverages unlawfully possessed, manufac-

tured, sold, imported or transported, and any stills, equipment, materials, utensils, vehicles, boats, vessels, animals, aircraft, or any of them, which are or have been used in the unlawful manufacture, sale, importation or transportation of the same."

Section 601 of said Liquor Code provides that no property rights shall exist in any liquor, alcohol or malt or brewed beverage illegally manufactured or possessed, or in any still, equipment, material, utensil, vehicle, boat, vessel, animals or aircraft used in the illegal manufacture or [fol. 30] illegal transportation of liquor, alcohol or malt or brewed beverages, and the same shall be contraband, and proceedings for its forfeiture to the Commonwealth may, at the discretion of the Board, be instituted in the manner hereinafter provided. No such property when in the custody of the law shall be seized or taken therefrom on any writ of replevin or like process (as amended 1956 April 20 P.L. (1955) 1508 Section 1).

Was there reasonable and probable cause for the enforcement officers stopping the car in question? The officers admitted they had not observed the operator of the vehicle doing anything unlawful. They admitted they acted on suspicion buttressed by their observation that the car was riding low in the rear and that it was a 1958 Plymouth Sedan. Officer Snyder testified "that he had reason to believe that a late model, black, four-door Sedan, Plymouth, was delivering liquor illegally into Pennsylvania from a dealer in South Jersey". There was no testimony that the instant automobile is a four-door, black, Plymouth Sedan. The only testimony was that it is a 1958 model Plymouth Sedan. There was no testimony that the automobile was weighted down. There was no testimony that prior to stopping the automobile, the officers had observed the contents of said automobile, nor that the contents of the automobile were visible to the officers prior to their stopping said automobile. The testimony indicated that to outward appearances, the driver was in no manner violating any law of the Commonwealth. He made no effort to avoid capture or to escape. In a companion petition, the Commonwealth sought forfeiture of the liquor and wine, which were con-

fiscated. The petition was not oposed, and forfeiture was ordered.

Under the circumstances, did the officers have sufficient probable cause to stop the automobile and to effect the [fol. 31] seizure thereof? Were the officers possessed of sufficient facts or information that they could have presented (time and circumstances permitting) to a Magistrate and procured a search warrant? What illegal activity transpired in their view to justify them in stopping the automobile and making an arrest without a warrant? The legality of the arrest, search and seizure depends on the existence of probable cause. Evidence of probable cause need not be evidence such as required to establish guilt of the defendant: Brinegar v. United States, 338 U.S. 160. On the other hand, good faith on the part of the arresting officers is not sufficient to establish probable cause. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed: Slocey v. Emery, 97 U.S. 642, 645; Director General v. Kastenbaum, 263 U.S. 25, 28.

A leading case is Henry v. United States, 361 U.S. 98. In said case, federal officers investigating a theft from an interstate shipment of whiskey, on two occasions observed cartons being placed in a motorcar, in a residential district, followed and stopped the car, searched the car, found and seized cartons containing radios stolen from an interstate shipment. They placed the petitioner and another man under arrest. The court reversed the conviction of the petitioner on the grounds that there was not probable cause for the arrest leading to the search, that produced the evidence on which the conviction rested.

At page 103 of said Opinion (Henry v. United States), Justice Douglas stated:

> "The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for the purposes of this case, [fol. 32] was complete. It is, therefore, necessary to

> determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses as Johnson v. U.S., supra (333 U.S. 10, 13-15) holds."

The court pointed out that, in the absence of explanation, the rumor of petitioner's involvement in some interstate shipment was practically meaningless, and the actions of the petitioner and his companion, as disclosed by the evidence, would not have been sufficient to justify a Magistrate in issuing a warrant.

The court further stated at page 104:

> "What transpired at or after the car was stopped by the officers is, as we have said, irrelevant to the narrow issues before us. To repeat, an arrest is not justified by what the subsequent search discloses. Under our system, suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that the citizens be subject to easy arrest."

That the doctrine against unlawful search and seizure is less strictly interpreted in the cases of automobiles as opposed to dwellings needs no citation of authority. The cases are many. Yet, the requirement of probable cause is not weakened nor abandoned. The probable cause must be found in the circumstances of the particular situation. The test is whether in the particular circumstances a prudent man was possessed of such factual information or knowledge as opposed to mere suspicion, as to reasonably convince him that a crime had been or was being committed.

In Carroll v. U.S., 267 U.S. 132, when federal officers stopped and searched a car they *knew* to be involved in bootlegging, the officers had no warrant but the search and seizure was upheld, for the reason that the officers had probable cause arising out of the particular circumstances.

In the instant case, the officers, prior to stopping the car, did not know this car, did not know the driver, did not know and had not observed the contents of the car, and had

[fol. 33] witnessed no breach of the law. Were the officers legally permitted to stop the car and search it solely upon an observation that the car was low in the rear? That this was the sole basis for their action is apparent, despite the statement of Officer Snyder "that he had reason to believe that a late model, black, four-door, Sedan, Plymouth, was delivering liquor illegally into Pennsylvania from a dealer in South Jersey", because on cross-examination this officer stated that the information was obtained from his own prior observations. The factual falsity of the latter statement is obvious because both officers admitted that they had not previously seen either this automobile or the driver thereof. Hence, they could not have derived information from prior observations, as this was the first time they had ever seen this automobile and this driver. Lacking factual information, the action of the officers was based solely on suspicion, and was unlawful. Brinegar v. United States, supra, and Henry v. United States, supra.

In the instant case, the action was by state officers and in a state proceeding, whereas in Henry v. United States, supra, the action was by federal officers in a federal proceeding. However, in the recent case of Mapp v. Ohio, 81 Sup. Cut. 1684 (decided June 19, 1961) the Supreme Court of the United States held that the exclusionary rule that evidence illegally obtained was not admissible, was applicable to the courts of all the states of the United States, as well as to the federal courts.

This opinion reversed a state court conviction (and overruled Wolf v. Colorado, 338 U.S. 25 (1949)) and applied the due process clause of the Fourth and Fourteenth Amendments of the Constitution to state prosecutions, as well as to federal prosecutions.

[fol. 34] It follows, therefore, that the Petition for Forfeiture of the automobile must be dismissed. The seizure was founded upon evidence illegally obtained, since under the particular circumstances the officers acted without probable cause.

Date: November 30, 1961.

By the court, McClanaghan, J.

[fol. 36] [File endorsement omitted]

[fol. 37]

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 58

No. 14 October Term, 1962

COMMONWEALTH OF PENNSYLVANIA, Appellant,

v.

ONE 1958 PLYMOUTH SEDAN, IN POSSESSION OF McGONIGLE.

Appeal of Pennsylvania Liquor Control Board from Order of Quarter Sessions Court of Philadelphia County, Misc. Liquor Condemnation Docket No. 4 of February Term, 1961.

OPINION BY ERVIN, J.—Filed November 15, 1962

On December 16, 1960 two enforcement officers of the Pennsylvania Liquor Control Board were stationed on the Admiral Wilson Boulevard in New Jersey, the approach to the Benjamin Franklin Bridge leading into Philadelphia, Pennsylvania. At 6:30 a.m. on the above date the officers saw a black Plymouth four-door sedan, bearing Pennsylvania registration plates, approaching the bridge. The car was quite low in the rear and the officers followed the car across the bridge into Philadelphia and on Vine Street, west of Sixth Street, in Philadelphia, the officers stopped the car, identified themselves and questioned the operator, George McGonigle. In the rear of the car and in the trunk the officers found 375 bottles (31 cases) of high priced whiskey and wine not bearing Pennsylvania tax seals. The operator of the car, McGonigle, stated to the officers that he had been hired to deliver this liquor from Margate to Philadelphia for $30.00, that he knew it was unlawful but took the chance. McGonigle made no objection to the search of the automobile. The car and liquor were seized and McGonigle was arrested. The officers had neither a search nor a body warrant. A petition for the forfeiture of the

car was filed in the court below and, after hearing, the petition was dismissed and it was directed that the car be returned to the owner. The court held that the seizure was founded upon evidence illegally obtained. The Commonwealth appealed.

The procedure for the forfeiture of this car is provided by §601 of the Liquor Code (as amended by the Act of [fol. 38] April 20, 1956), 47 PS §6-601, and in effect states: "No property rights shall exist in any liquor, alcohol or malt or brewed beverage illegally manufactured or possessed, or in any still, equipment, material, utensil, vehicle, boat, vessel, animals or aircraft used in the illegal manufacture or illegal transportation of liquor, alcohol or malt or brewed beverages, and the same shall be deemed contraband and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board, be instituted in the manner hereinafter provided."

The owner of the automobile presented no evidence and there can be no question but that the automobile was being used to illegally transport untaxed liquor from New Jersey into Pennsylvania.

The Fourth Amendment to the United States Constitution prohibits only unreasonable searches and seizures.

We repeat what we said in *Com.* v. *One 1955 Buick Sedan*, 198 Pa. Superior Ct. 133, 137, 138, 182 A. 2d 280: "The leading case in this field is Carroll v. United States, 267 U.S. 132, 149, 69 L. ed. 543, wherein Chief Justice TAFT said: 'On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The 4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.'

". . . At p. 153 it was further said: 'We have made a somewhat extended reference to these statutes to show

that the guaranty of freedom from unreasonable searches and seizures by the 4th Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for [fol. 39] contraband goods, where it is not practicable to secure a warrant because the vehicle can be moved quickly out of the locality or jurisdiction in which the warrant must be sought.

"'Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary, because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.'

"It was further said, at pp. 155, 156: 'The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.'"

In the case of *Henry v. United States*, 361 U.S. 98, 80 S. Ct. 168, a case greatly relied upon by the appellee, the Court, in the majority opinion, at page 104, said: "The fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure. The police must have reasonable grounds

to believe that the particular package carried by the citizen is contraband. Its shape and design might at times be adequate. *The weight of it and the manner in which it is carried* [fol. 40] *might at times be enough.*" (Emphasis supplied)

We also add that the place where the search is made should be taken into consideration.

With these principles in mind, let us review the facts in the present case. Officer Snyder testified: "That I had reason to believe that a late model black four-door sedan, Plymouth, was delivering liquor illegally into Pennsylvania from a dealer in South Jersey." In cross-examination he stated that he got this information from previous observations, although he had admitted that he had never seen this car or the driver before. The "previous observations" were not explored any further. A further exploration might have revealed more information concerning the source of the officer's knowledge. This car attracted the officers' attention because it was quite low in the rear. When the officers first observed the car, it was about to enter the Delaware River Bridge leading from the State of New Jersey to the State of Pennsylvania. A state should have the right to stop a traveler coming into the state and to search his belongings to ascertain whether he is bringing into the state any property upon which a state tax is due. The Commonwealth of Pennsylvania has a sales tax, a liquor tax and a cigarette tax, and if its officers may not stop vehicles coming into the state to ascertain whether its laws are being violated, law enforcement will be greatly impeded.

Many times travelers are stopped at state borders and their cars are searched to ascertain whether diseased vegetation is being brought into the state. Nobody complains about this or feels that his privacy is being unduly invaded. Airplane passengers are many times required to open their luggage for inspection to ascertain whether bombs are being brought upon the plane. These are concomitants of a modern civilization and are accepted by most people without objection for their own protection and best interests. Also, the search was on December 16, which was at a time when [fol. 41] the officers might well believe illegal liquor would

be transported into Pennsylvania to meet the demands of the holiday trade. If the officers had left the scene to obtain a search warrant, the evidence would undoubtedly have been lost. The back rest of the rear seat had been removed so that the liquor could be stored in the back part of the car in addition to being stored in the rear trunk. Just what the officers could observe through the windows of the car when it was stopped was not brought out in the testimony. Undoubtedly they could have seen what was on the rear seat of the car without making any search. Whether they could tell from this point of view that the liquor did not bear Pennsylvania seals, we do not know. There can be no doubt that a misdemeanor (the transportation of untaxed liquor) was being committed in their presence. Under all of the circumstances, we are of the opinion that the search and seizure were reasonable. Mr. Justice Clark, in his dissenting opinion in the *Henry* case, said at page 106: "When an investigation proceeds to the point where an agent has reasonable grounds to believe that an offense is being committed in his presence, he is obligated to proceed to make such searches, seizures, and arrests as the circumstances require. It is only by such alertness that crime is discovered, interrupted, prevented, and punished. We should not place additional burdens on law enforcement agencies."

Order reversed and it is hereby ordered that the 1958 Plymouth sedan bearing Manufacturer's Serial No. LP1N3159 be and the same is hereby forfeited and condemned and it is ordered that the vehicle shall be delivered to the Pennsylvania Liquor Control Board for its use or sale or disposition by the board in its discretion, in accordance with the Act of 1951, April 12, P.L. 90, art. VI §603(c), as amended, 47 PS §6-603(c).

Montgomery, J., files a dissenting opinion.

Flood, J., files a dissenting opinion in which Watkins, J., joins.

[fol. 43]

DISSENTING OPINION BY MONTGOMERY, J.

Although the United States is rightfully proud of the various freedoms set forth in its Constitution, it also proudly boasts of another one not specifically mentioned. I refer to the freedom of travel from one state to another without visa or barrier.

As I read the opinion of the majority in this case, that freedom will exist no longer. If automobiles may be stopped at the state lines and searched for contraband without cause or reason, traveling here will be no different than going from country to country in other parts of the world.

I find no reasonable cause in the present case for stopping and searching the automobile of the appellee; nor do I interpret any of the evidence or the contention of the Commonwealth as indicating that the search was consensual. The lower court was of the same opinion.

Therefore, I respectfully dissent.

[fol. 45]

DISSENTING OPINION BY FLOOD, J.

I cannot agree that there was reasonable or probable cause for the search in this case. The mere fact that the car looked like another one of which the officers had some justifiable suspicions does not give ground for reasonable suspicion that this one was being used to break the law. Admittedly this was not the car which the officers were on the look-out for.

Beyond this the only ground for suspecting that the car was carrying contraband was that it was "quite low in the rear". I do not believe that the law sanctions the search of a car which appears to be low in the rear because this fact alone engenders suspicion in the minds of the enforcement officers that it might be carrying liquor illegally into the State. Taken with other circumstances, the low rear might give ground for reasonable suspicion. In *Patenotte* v. *United States*, 266 F. 2d 647 (1959), the court listed five facts to be considered in determining whether there is proper cause to stop and search a vehicle: (1) the reputa-

[fol. 46] tion of, or the informant's report concerning, the

occupants; (2) the reputation of the vehicle or its owners; (3) the condition of the vehicle (e.g. weighted down); (4) information from informers as to the illegal nature of the trip; and (5) the reputation of the place where the vehicle is found. No doubt this list is not exhaustive. However, we have seen no case where the third of the five facts listed was held sufficient of itself to justify a search and seizure.

If this had been the vehicle of which the officers entertained suspicions earlier and it was driven by persons or associates of persons, who, to their knowledge, had imported liquor into Pennsylvania illegally, there would have been enough, and the fact that the vehicle was weighted down would have added to the reasonableness of the search. However, the naked fact that the vehicle was weighted down merely means that there was a large amount of material or some heavy material in the trunk, or perhaps that there was something wrong with the springs. Of itself it does not furnish reasonable ground for a search and seizure.

[fol. 47] Nor can I accept the argument that the state should have a right to stop a traveler coming into the state and to search his belongings to ascertain whether he is bringing into the state any property upon which a state tax is due. This amounts to saying that the state has a right to establish custom houses, barriers or roadblocks at its border with other states. This takes us back to the Articles of Confederation or, worse, to the toll-gates of the villages of mediaeval Europe.

Searches at state borders for diseased vegetation or searches of airplane passengers' baggage to ascertain whether bombs are being brought on the plane furnish no analogy for the situation before us. Protection of life and health may furnish a necessity for a search which will be held reasonable under circumstances of relatively slight suspicion, where it would not be at all reasonable to search merely for the enforcement of the revenue laws of the state. The Fourth Amendment to the United States Constitution protects persons against "unreasonable searches and seizures". The courts naturally cannot define with precision and in detail what constitutes a reasonable search.

At best they can list factors such as was done in the *Patenotte* case, supra. And no doubt other factors might be important under varying circumstances. Certainly, among the things which must be taken into consideration in determining whether a search is reasonable is the necessity for immediate investigation. *Brinegar* v. *United States,* 338 U.S. 160 (1949). It was a necessity for immediate stopping and searching of the car in *Carroll* v. *United States,* 267 U.S. 132 (1925), cited in the majority opinion, which justified searching the car in that case without a warrant. There the circumstances furnished adequate grounds for suspecting that the car was carrying contraband. When [fol. 48] there is no such adequate ground for suspicion then something else of overriding importance must furnish the necessity for immediate investigation. As Mr. Justice Jackson said in his dissenting opinion in *Brinegar* v. *United States,* supra at pp. 180, 183: "If we assume for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger." To sustain what amounts to a customs barrier to enable the Commonwealth to confiscate some liquor or collect the tax due upon it with no more ground of suspicion than exists here, is to my mind a clear violation of rights guaranteed by the Fourth and Fourteenth Amendments.

As Chief Justice Taft said in the *Carroll* case, supra at pp. 153-4: "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self

protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belong-[fol. 49] ings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

The prohibition against the importation of liquor into the Comonwealth, except in accordance with the regulations of the board, contained in §491(8) of the Liquor Control Act of April 12, 1951, P. L. 90, art. IV, 47 PS §4-491(8) is aimed at the protection of the State's revenues from the sale of liquor within its borders. If, however, it can be said to have for its purpose the reduction or regulation of the consumption of liquor, the result is the same. The provision of our Liquor Control Act forbidding importation of liquor into the State is authorized by §2 of the Twenty-first Amendment to the Constitution of the United States. But while the Commonwealth may legislate against the importation of untaxed liquor into Pennsylvania under the Twenty-first Amendment, which to that extent modifies the congressional power to regulate interstate commerce under art. I, §8 of the United States Constitution, yet I see nothing in that amendment which modifies in liquor cases the prohibition in the Fourth and Fourteenth Amendments against unreasonable searches or seizures. And under Chief Justice Taft's language in the *Carroll* case, supra, this search would not have been authorized even under the Eighteenth Amendment.

This case recalls the words of Mr. Justice Musmanno relating to a similar invasion of a citizen's right of privacy [fol. 50] —by wiretapping—in order to get evidence of another crime, carrying no threat to life and limb—gambling —in his dissenting opinion in *Commonwealth* v. *Chaitt*, 380 Pa. 532, at 549, 112 A. 2d 379, 388 (1955): "I would rather see a petty gambler go free than that the great people of this Commonwealth should be deprived of the personal liberties forged in the fires of Lexington and Gettysburg

and formulated amid the storm of debate in our legislative halls."

I would affirm the order of the court below suppressing this evidence.

Watkins, J. joins in this dissent.

[fol. 79] [File endorsement omitted]

[fol. 80]

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 204—January Term, 1963.

COMMONWEALTH OF PENNSYLVANIA

v.

ONE 1958 PLYMOUTH SEDAN, In Possession of McGonigle, Appellant

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Appeal from Judgment of the Superior Court of Pennsylvania, No. 14 October Term, 1962
Entered November 15, 1962

OPINION—FILED APRIL 21, 1964

Jones, J.

At approximately 6:30 a.m. on December 16, 1960, two officers of the Pennsylvania Liquor Control Board, stationed near the approach to the Benjamin Franklin bridge in New Jersey, observed a 1958 Plymouth sedan bearing Pennsylvania license plates proceeding toward the bridge in the direction of Philadelphia. Noting that "the car was low in the rear, quite low", the officers followed the automobile across the bridge into Philadelphia where they stopped and searched the automobile without first having obtained either a body or a search warrant. Their search

revealed that the rear seat and back-rest of the automobile had been removed and that the rear and trunk of the automobile contained 375 bottles of whiskey and wine none of which bore Pennsylvania tax seals.

[fol. 81] Both the car and alcoholic beverages were seized. The Commonwealth instituted proceedings for the forfeiture of the automobile in the Court of Quarter Sessions of Philadelphia County. That court dismissed the forfeiture proceedings on the ground that the seizure of the automobile "was founded upon evidence illegally obtained", i.e., without a warrant and without probable cause. The Superior Court reversed, three judges dissenting, and we granted an allocatur.

The thrust of the arguments, both of the appellant and the Commonwealth, is directed to the validity and propriety of the search and the subsequent seizure by the officers of this Plymouth automobile. In our view, such arguments are beyond the point. By reason of the nature of the present proceeding, i.e., a forfeiture procedure, we consider it unnecessary to determine the propriety and validity of the search and the seizure of this automobile.

This proceeding was instituted under the Act of April 12, 1951, P. L. 90, art. VI, § 601, as amended by the Act of April 20, 1956, P. L. (1955) 1508, § 1, 47 PS § 6-601, which provides: "No property rights shall exist in any . . . vehicle . . . used in the illegal transportation of liquor, alcohol or malt or brewed beverages, and the *same shall be deemed contraband* and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board,[1]

[1] Prior to the 1956 amendment, the forfeiture of an automobile used in the illegal transportation of liquor was mandatory: *Commonwealth* v. *One 1939 Candillac Sedan, et al.*, 158 Pa. Superior Ct. 392, 45 A. 2d 406; *Commonwealth* v. *One Dodge Sedan*, 141 Pa. Superior Ct. 34, 14 A. 2d 600. The 1956 amendment deleted from Section 601 of the 1951 Act the phrase "shall be forfeited to the Commonwealth" and inserted, in lieu thereof, the phrase "and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board, be instituted. . . ." It has been held that, as a result of this amendment, the Board has discretion to *institute* forfeiture proceedings and the courts have discretion as to whether forfeiture shall be decreed even though illegal use of the auto-

[fol. 82] be instituted in the manner hereinafter provided. No such property when in the custody of the law shall be seized or taken therefrom on any writ of replevin or like process." (Emphasis supplied.) This proceeding is not a criminal proceeding (*Commonwealth* v. *One 1927 Graham Truck*, 165 Pa. Superior Ct. 1, 67 A. 2d 655; *Commonwealth* v. *One 1939 Cadillac Sedan*, supra) but a civil proceeding in rem (*Commonwealth* v. *One Five-Passenger Overland Sedan*, 90 Pa. Superior Ct. 376) and is directed to the confiscation of the property itself on the theory that the property is the offender.

The statute, upon which this proceeding is based, mandates that no property rights shall exist in an automobile used in the illegal transportation of liquor and declares an automobile engaged in such use shall be deemed to be contraband. Articles of contraband are things and objects outlawed and subject to forfeiture and destruction upon seizure: 17 C. J. S. 510. "It is the use to which the property is put that renders property, otherwise lawful, rightful to have, use and possess, subject to seizure and forfeiture": *Hemenway & Moser Co., et al.* v. *Funk, et al.*; 100 Utah 72, 106 P. 2d 779. The purpose for which the thing or article is used acts as the criterion for the classification of such thing or article as contraband or non-contraband.

[fol. 83] The court below refused to decree a forfeiture in the instant case because, inferentially at least, it believed that the rule of exclusion of evidence illegally obtained applied to this proceeding, even though not a criminal proceeding. In this respect the court erred.

In *United States* v. *One Ford Coupe*, 272 U. S. 321, 47 S. Ct. 154, almost forty years ago the U. S. Supreme Court, speaking through Mr. Justice Brandeis, recognized that an illegal or unauthorized seizure of an automobile

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mobile has been established: *Commonwealth* v. *One 1957 Chevrolet Sedan, et al.*, 191 Pa. Superior Ct. 179, 155 A. 2d 438; *Commonwealth* v. *One 1958 Oldsmobile Sedan*, 194 Pa. Superior Ct. 352, 355, 356, 168 A. 2d 776; *Commonwealth* v. *One 1959 Chevrolet Impala Coupe*, 201 Pa. Superior Ct. 145, 191 A. 2d 717.

did not preclude the possibility of a forfeiture proceeding: "It is settled that where property declared by a federal statute to be forfeited because used in violation of federal laws is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized." (272 U. S. at p. 325, 47 S. Ct. at p. 155.)[2]

Very recently, the U. S. Court of Appeals for the Third Circuit in *U. S.* v. *$1,058.00 in United States Currency*, 323 F. 2d 211, held that contraband, even though unlawfully seized, may nevertheless be forfeited. The Court stated: "The doctrine of One Ford Coupe [supra] has been applied by the circuits in Interbartolo v. United States, 303 F. 2d 34, 38 (1 Cir., 1962); United States v. Carey, 272 F. 2d 492, 494-495 (5 Cir., 1959); United States v. One 1956 Ford Tudor Sedan, 253 F. 2d 725, 726, 727 (4 Cir., 1958); United States v. Pacific Finance Corp., 110 F. 2d 732 (2 Cir., 1940); Bourke v. United States, 44 F. 2d 371 (6 Cir., 1930).

[fol. 84] "In United States v. Jeffers, 342 U. S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951), and Trupiano v. United States, 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663 (1948), where it was held that property illegally seized could not be used as evidence in a criminal proceeding, it was noted that such property could nevertheless be forfeited.

"It was said in Jeffers, 342 U. S. at page 54, 72 S. Ct. at page 96, 96 L. Ed. 59:

> "'*Since the evidence illegally seized was contraband the respondent was not entitled to have it returned to him.* It being his property, for the purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial.' (emphasis supplied)

and in Trupiano, 334 U. S. at page 710, 68 S. Ct. at pages 1234-1235, 92 L. Ed. 1663:

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[2] In *Dodge et al.* v. *U. S.*, 272 U. S. 530, 532, 47 S. Ct. 191, 192, the Court, speaking through Mr. Justice Holmes, recognized the same rule.

"'It follows that it was error to refuse petitioners' motion to exclude and suppress the property which was improperly seized. *But since this property was contraband, they have no right to have it returned to them.*' (emphasis supplied)

"The sum of Jeffers and Trupiano is that the body of law relating to unlawful searches, arrests and seizures in criminal proceedings is without impact in a libel for forfeiture action which is an *in rem* proceeding.

"As was succinctly stated in Grogan v. United States, 261 F. 2d 86, at page 87 (5 Cir., 1958), cert. den. 359 U. S. 944, 79 S. Ct. 725, 3 L. Ed. 2d 677:

[fol. 85] "'The seizure of property, the title to which has been forfeited by the United States, is to be distinguished from the exclusion of evidence secured through an unlawful search and seizure. In the one case the Government is entitled to the possession of the property, in the other it is not.'"

In *U. S.* v. *Carey*, 272 F. 2d 492, 494, 495, where federal agents had noted that an automobile "was sagging in the rear and appeared to be heavily loaded" and had stopped the automobile finding a bottle of moonshine whiskey and 52 gallons of nontaxpaid whiskey in the car, the United States instituted forfeiture proceedings. Therein the Court stated: "There is a proper distinction between obtaining evidence for a criminal prosecution and a seizure of forfeited property under Internal Revenue laws" (p. 493) and that "[e]ven if it were assumed that the search and seizure were illegal, that would not defeat the Government's action for forfeiture." (p. 494). In *U. S.* v. *One 1956 Ford Tudor Sedan*, 253 F. 2d 725, 727, the Court said: "Legal infirmities in the seizure do not impair the right of the United States to condemn or clothe the former owner with property and possessory rights he lost when he used the property in violation of the revenue laws. Considerations which, in criminal cases, require the suppression of evidence obtained in an unlawful search or seizure have no application here. . . . We deem it un-

necessary to extend, beyond the suppression of evidence in the criminal jurisdiction, the overlordship of the conduct of federal law enforcement officers."[3] See also: *Martin et al.* v. *U. S.*, 277 F. 2d 785, 786.

[fol. 86] In this Commonwealth our courts have held that an unlawful seizure of contraband will not bar its forfeiture. In *Commonwealth* v. *Scanlon*, 84 Pa. Superior Ct. 569, 571, 572, Judge (later President Judge) Keller stated: "If intoxicating liquor, unlawfully possessed, is found on a man's premises and comes into possession of the Commonwealth, the law of this State does not require it to be returned to his criminal possession even though custody of it was obtained by an illegal search [citing cases]. . . . This is on the principle that, if the possession is unlawful, the liquor is forfeited to the Commonwealth, and no property right can exist in favor of an individual to such forfeited or contraband property." See also: *Commonwealth* v. *Davis*, 163 Pa. Superior Ct. 224, 60 A. 2d 552; *Commonwealth* v. *Hunsinger*, 89 Pa. Superior Ct. 238, 242; *Commonwealth* v. *One Box Benedictine, etc.*, 89 Pa. Superior Ct. 467, aff'd 290 Pa. 121.

The legislature has seen fit to declare the non-existence of property rights in any automobile used in the illegal transportation of liquor and that such an automobile is contraband. Under the decisional law of both federal and state courts, supra, we are satisfied that, even if the instant automobile had been illegally seized, such fact would not preclude the instant civil proceeding of forfeiture.[4]

Judgment affirmed.

Mr. Justice Musmanno dissents.

Mr. Justice Roberts files a concurring opinion.

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[3] We are not unaware of the observation of Mr. Justice Goldberg, concurring in *Cleary* v. *Bolger*, 371 U. S. 392, 83 S. Ct. 385 (1963), that the effect of the Fourth Amendment in civil cases in the federal courts is not "totally settled" and of the observation of Mr. Justice Brennan, dissenting in *Cleary*, that "it has not yet been settled whether Mapp [Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081] applies to administrative proceedings."

[4] We do not, nor need we, for the reasons set forth in this opinion, pass upon the validity of the seizure of this automobile. The validity of such seizure is of no moment in this proceeding.

[fol. 88]

CONCURRING OPINION—Filed April 21, 1964

ROBERTS, J.

I concur fully with the opinion of the Court. However, I wish to add the following comment concerning the Liquor Code and its application to this case.

Section 602 of the Liquor Code, April 12, 1951, P.L. 90, 47 P.S. § 6-602, provides:

> "(b) A copy of said petition [for forfeiture] shall be served personally on said owner if he can be found within the jurisdiction of the court, or upon the person or persons in possession at the time of the seizure thereof. Said copy shall have endorsed thereon a notice as follows:
>
> "'To the Claimant of Within Described Property: You *are required to file an answer* to this petition setting forth your title in and right to possession of said property, within fifteen (15) days from the service hereof; and you are also notified that *if you fail to file said answer, a decree of forfeiture and condemnation will be entered against said property.*'" (Emphasis supplied.)
>
> [fol. 89] "(d) Upon the filing of any claim for said property, setting forth a right to possession thereof, the case shall be deemed at issue and a time fixed for the hearing thereof."

Here, the uncontradicted fact is that the petition for forfeiture contained the notice to claimant in the precise statutory language and that no answer or claim was filed as required by the Code. Upon the failure to file an answer, all that the Code mandates is that a forfeiture decree in rem be entered.[1] Moreover, absent the filing of a claim under

[1] It should be noted that, as the trial court observed, "in a companion petition, the Commonwealth sought forfeiture of the liquor and wine, which was confiscated. The petition was not opposed, and forfeiture was ordered." No appeal was taken from that order.

subsection (d), there was no issue to be considered by the court below.[2]

The facts are undisputed, particularly the fact that the car was used in the illegal transportation of untaxed liquor, which may be deemed admitted on this record. In the absence of an answer to the petition or the filing of a claim of ownership pursuant to the Code, there remains only the entry of a final order of forfeiture as mandated by the Code.

[fol. 90] Petition for Rehearing covering 5 pages filed April 30, 1964 omitted from this print.

It was denied, and nothing more by order. June 30, 1964.

[fol. 103] Double Certificate to foregoing transcript (omitted in printing).

[fol. 105]

IN THE SUPREME COURT OF PENNSYLVANIA
January Term, 1963

ORDER DENYING PETITION FOR REARGUMENT—June 30, 1964
Petition denied.

Per Curiam.

[fol. 106]

SUPREME COURT OF THE UNITED STATES

No. 294—October Term, 1964

One 1958 Plymouth Sedan, Petitioner,

v.

PENNSYLVANIA

ORDER ALLOWING CERTIORARI—December 7, 1964

The petition herein for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania, Eastern District, is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.